way as before. He did not know that the goods contained sugar or were dutiable. This knowledge depends on letter "Q". The letter was written in Chinese, and a translation has been put in. Sung Kwok Lau a translator attached to the Magistrate's Court when recalled said:—

> "The phrase in the original is vague..... the writer does not seem to be very well educated.....it could be taken to mean the railway department".

A doubt as to the meaning is created by this evidence.

Translation of letter "Q":

Messrs. Cheong Chan Hup Kee.

Gentlemen,

We were in receipt of your letter yesterday and its contents were noted accordingly.

With regard to the 5 casks of "Tik Choo Si Yow" (i.e. Chinese Sauce) you instructed us to obtain for you, we would have sent them to you immediately (so as to enable you) to meet the demands of the market if not on account of some difficulty arising recently in connection with this commodity.

We heard that more than 10 casks were sent to Perak at the end of last year. The Railway Department (? or the Customs Department) found that these goods were inferior in quality and (therefore) disallowed their consignment but insisted on their being handed over for examination.

Later, we heard from people (of this Department?) that consignment of these goods could be allowed as usual without examination on a payment of $1.50 per cask. Eventually this was got through.

However, it is now said by the people concerned that $2 per cask must be paid before they can allow the same thing to be done.

On this account we dare not send the goods to you before getting your consent.

We hope you will let us know what is to be done so that we can act accordingly.

But, this is merely a consent to receiving and forwarding the goods and will not be responsible for anything else.

For this reason we are obliged to write to you with the request that you will make your decision and inform us accordingly.

If delivery of goods can be conveniently taken at Klang, it would be better to send them by steamer, besides the freight would be also cheaper.

Dated, 8th day, 1st Moon, Ting (Chou Year) =18th February (1937).

Choped: Correspondence Seal of Kwong Mun Woh Kongsi, Penang.

Now, where the duty of giving an explanation is cast upon a defendant, and an explanation is given, which is consistent with innocence, the Court must consider whether it might reasonably be true although not convinced its truth. The learned Magistrate does not appear to have given his attention to this matter.

In view of the evidence of the translator, the explanation that the accused was not aware of the contents of the goods in question, and considered them undutiable (an explanation which was consistent with innocence) might reasonably be true although the Court might not be convicted of its truth.

Therefore the accused should have been acquitted. The appeal is accordingly allowed, and the conviction and sentence are quashed; any fine paid to be refunded to the appellant. Duty will, of course, have to be paid.

Appeal allowed. Finding and sentence reversed. Accused acquitted.

[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

WAN ALI BIN WAN ABDULLAH..... Appellant

against

PUBLIC PROSECUTOR.....Respondent.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 4 of 1937]

(KUANTAN).

Section 409 of the Penal Code — Criminal breach of trust by a public servant-section 406 of the Penal Code—Criminal breach of trust.

To bring an offence within section 409 of the Penal Code it is necessary to show that property was entrusted to a public servant and that he accepted the property entrusted, being in his public capacity required or authorised to accept it.

The test is the liability of Government to make good the loss of the moneys entrusted under section 10 of the Government Suits Enactment (Cap. 17).

The appellant was penghulu of his Kampong and two persons, applying for land, paid monies to him in respect of fees payable to the Collector of Land Revenue. Appellant applied for land on their behalf and gave them receipts but did not pay the money to the Collector of Land Revenue.

K. K. Benjamin for appellant.

C. H. Whitton, Deputy Public Prosecutor, for Public Prosecutor.

CUSSEN, J.—I see no reason to interfere with the Magistrate's finding of facts. I am of opinion it is correct. But I consider the facts did not constitute an offence under section 409 of the Penal Code but under section 406, Penal Code.

It was no part of the duty of the accused as Penghulu to receive such deposits as in this case; he was neither authorised nor required to do so; he could, without failing in the slightest in his official duties, have refused to accept these monies.

These monies were not due to Government. He was not entrusted with these sums in his capacity as a public servant.

It is quite clear that the Government is not liable to make good the loss of these monies under section 10 of the Government Suits Enactment; and this, I think, is a decisive test.

"In order to bring a case within section 409, it is.....necessary to show that property was entrusted, to a public servant and that he accepted the property entrusted, being in his public capacity required or authorised to accept it. Otherwise in accepting the property he acts as a mere volunteer, and is not entrusted with it in his capacity of a public servant. It is not sufficient to show merely that a person delivered the property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or of the person accepting it, or of both, that the latter was authorised to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant." (*Per* Plowden, J.; in *Bhag Singh* (1876) P.R. No. 24 of 1876, 46 quoted in "The Law of Crimes" (*Ratanlal* 14th edition at page 999).

I therefore alter the finding to a conviction under section 406 Penal Code.

As regards the sentence, I consider it excessive, even if the conviction had been rightly made under section 409, Penal Code. The accused is an old man, in bad health, has a long, clear record of service; the sums of money are small, and restitution has been made.

I alter the sentence to a fine of $30/- or in default one month's simple imprisonment.

Finding altered. Sentence reduced.

[APPELLATE CRIMINAL JURISDICTION]

AITKEN, J.

October 1, 1937.

TAN YONG SIN.....**Appellant**

v.

PUBLIC PROSECUTOR.....**Respondent**

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 36 of 1937]

Opium and Chandu Enactment (Cap. 134) section 9 (b)—Mens rea.

The prohibition in section 9 (b) of the Opium and Chandu Enactment (Cap. 134) is absolute and *mens rea* is not a necessary element in an offence under section 9 (b) or indeed in any of the offences created by section 9

G. H. Gartside for the appellant.

I. W. Blelloch, Deputy Public Prosecutor, for the respondent.

AITKEN, J.—In this case the appellant was convicted at Parit Buntar, on the 21st day of May last, of having chandu, other than Government chandu, in his possession at Parit Buntar about 7 o'clock in the forenoon of the 2nd of that month, contrary to the provisions of section 9 (b) of the Opium and Chandu Enactment.

He has appealed against that conviction on the ground that *mens rea* is a necessary element in all the offences created by this section 9 (b) of the Opium and Chandu Enactment, and that there was no evidence before the learned Magistrate to justify the inference that the appellant knew that the chandu in question was concealed in a package at the back of his motor car. Throughout the trial before the learned Magistrate it had been contended that the chandu in question had been planted in the package where it was found by an enemy of the appellant, who had thereupon informed the Customs Officers what they would find if they searched that particular package.

The appellant himself, and two others, gave evidence in support of that contention; and the circumstances related by them, which are not really in dispute, do show (a) that it would have been quite easy to plant the opium in question in the particular package where it was found, and (b) that the manner in which the appellant was stopped and searched is quite consistent with the appellant's denial of any knowledge of the opium found in his possession.

The first question I have to decide is this: is *mens rea* a necessary element in any of the offences created by this section 9 (b) which reads as follows:—

> "Subject to the exceptions specified in Section 46, no person other than the Commissioner shall import into or export from the Federated Malay States any chandu or have in his possession any chandu other than Government chandu."

The exceptions specified in section 46 of the Enactment have no bearing on the facts of this case, so that the only words I am called upon to interpret are these—"no person shall have in his possession any chandu other than Government chandu". Is that an absolute prohibition, regardless of the state of mind of the possessor; or is it necessary to prove guilty knowledge on his part?

Having regard to the object of the Enactment which is for the stringent control of opium in all its various forms, with a view to the eventual suppression of its use except under medical advice and supervision; and also having regard to the grammatical and ordinary meaning of the words in question; I have come to the conclusion that the prohibition is absolute, and that *mens rea* is not a necessary element in this offence, or indeed in any of the offences created by section 9 of the Enactment. There are, of course, many cases that could be cited on the point, but it is sufficient for the purposes of this judgment to point out that the ancient presumption of *mens*